Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KHADIR GHANAYEM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the prosecution failed, as a matter of law, to present evidence to support the jury verdict that Khadir Ghanayem was predisposed, independent of the government's acts of inducement and beyond a reasonable doubt, to violate the law of conspiracy to possess cocaine with intent to distribute.

LIST OF ALL PARTIES TO THE PROCEEDING
IN THE COURT WHOSE JUDGMENT IS SOUGHT
TO BE REVIEWED

1. Solicitor General
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   Washington, D.C. 20530

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No:

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1995

KHADIR GHANAYEM, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

Khadir Ghanayem respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Appendix B) is reported at 48 Fd.3d 1438. The opinion of the district court (Appendix A) is reported at 845 F.Supp. 556.

JURISDICTION

The court of appeals entered its judgment on February 28, 1995 (Appendix B) and following the entry of a petition for rehearing and suggestion for rehearing en banc, the court of appeals denied the petition on April 18, 1995 (Appendix C). The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

STATUTES AND RULES INVOLVED

Title 21, United States Code, Section 841 -- (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute or dispense, a controlled substance.

Title 21, United States Code, Section 846 -- Any person who attempts or conspires to commit any offense defined in this sub-

chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 18, United States Code, Section 2 -- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. **(b)** Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Federal Rule of Criminal Procedure 29(c) -- (See Appendix D)

STATEMENT OF THE CASE

Khadir Ghanayem and was charged in a two-count indictment with conspiring to possess with intent to distribute cocaine and attempting to possess with the intent to

distribute cocaine. 21 U.S.C. Sections 841(a)(1) and 846 and 18 U.S.C. Section 2. Mr. Ghanayem defended on the ground that DEA Agent William Grant entrapped him into committing the crime through a number of meetings, telephone calls and hiring the defendant at his auto repair business to do work on the agent's car. The jury found Mr. Ghanayem not guilty of attempting to possess cocaine with the intent to distribute, but guilty of conspiracy to possess with intent to distribute cocaine. Subsequently, the district court granted Ghanayem's Rule 29(c) motion ruling the government failed to produce evidence to establish petitioner was predisposed to participate in a drug conspiracy, as required to overcome his entrapment defense (Appendix A, pages A-38 to A-40). The court of appeals reversed the district court's judgment of acquittal, reinstated

the jury verdict and remanded for sentencing (Appendix B), on the principal basis that petitioner's "character and reputation predisposed him to being involved in a drug transaction". (Appendix B, page B-12). Neither Seventh Circuit precedent nor settled decisions of this court allow such a dubious justification to find predisposition in an entrapment case. Following remandment, the defendant was sentenced to five years in the federal penitentiary, the mandatory minimum sentence required to Title 21, United States Code, Section 841(b)(1)(B).

Jurisdiction of the District Court

The district court's jurisdiction was based on Title 18, United States Code, Section 3231, which grants original and exclusive jurisdiction in the federal district courts covering all criminal offenses

against the laws of the United States.

Jurisdiction of the Court of Appeals

The jurisdiction of the court of appeals for the Seventh Circuit was based on Title 28, United States Code, Section 1291, which confers jurisdiction on the courts of appeals over final judgments of the district courts. Title 18, United States Code, Section 3731, also permits the government to appeal an order of the district court dismissing an indictment after verdict.

TRIAL EVIDENCE

On March 30, 1993, DEA Agent Grant and a cooperating individual ("CI") went to the 1-2-3 Club on Diversey Avenue in Chicago. Grant had been told that it was a known "hangout" for criminals. There, the CI instead saw Ghanayem, an auto-repairman and cousin of the principle target of the investigation Mazen Shunnarah. The CI waved and

walked over to talk to Ghanayem. A conversation took place, during which Ghanayem handed the CI an auto body shop business card and told him to give him a call if he ever needed auto repair work. (Appendix A, pages A-16 to A-18)

The next contact with Ghanayem was on April 22, 1993. It took place at George's Auto Body Shop in Chicago, where Grant and the CI went to see him. Grant had a 1991 Mercedes 300SL convertible and asked Ghanayem if he could repair its windshield. (Appendix A, page A-19) At that time the CI and Grant steered the conversation to drugs, asking Ghanayem if he knew anyone who would want to buy five kilos. According to Grant, Ghanayem responded that he knew somebody who might be interested. (Appendix A, page A-20)

Ghanayem however testified that after discussing the repair of Grant's automobile,

Grant turned the conversation to drugs, to which Khadir Ghanayem responded that he does not buy, sell, or do drugs. (Appendix A, page A-21)

Following that meeting, the defendant did not contact Mazen Shunnarah, the CI nor Grant. So, on May 7, 1993, Grant went back to the body shop. Ghanayem discussed the repair of Grant's vehicle, but Grant kept leading the conversation to drugs. Grant asked Ghanayem if he knew anyone else besides his cousin "that might be interested", to which Ghanayem replied, "Not off hand, only one person. You... this is the only person that I know." (Appendix A, page A-27)

The tape-recorded conversation of May 7, 1993 between Ghaneyem and agent Grant revealed -- in contradiction to Grant's testimony that the defendant exhibited readiness to engage in a drug deal -- that

the defendant was neither experienced, willing nor interested in Grant's proposal. (Appendix A-30) In clear contradiction to Grant's characterization of defendant's alleged predisposition, the tape recordings established that Grant persistently returned the discussion to drugs while Ghanayem ultimately went along with Grant after having been overcome by Grant's enticement. (Appendix A, pages A-31 to A-32)

In the May 12 and May 20, 1993 meetings, Ghanayem repeatedly discussed auto repairs while Grant brought up the subject of drugs. By May 27, 1993, Ghanayem eventually spoke with his cousin Shunnarah, price and quantity were discussed and in subsequent meetings, Ghanayem discussed the possibility of future deals and requested a $1,000.00 commission. (Appendix A, pages A-32 to A-33) Ultimately, no transaction ever

took place between Grant and Shunnarah, but Khadir Ghanayem was prosecuted and convicted of conspiracy to possess with intent to distribute cocaine while acquitted by the jury of attempted possession of cocaine.

Twenty-nine year old Ghanayem took the stand in his own defense. His education consists of one year of high school, after which he took up trade school and received a certificate in mechanics. He'd been an auto mechanic for ten years. He drove a damaged automobile that he purchased for $3,000.00. He had $2,000-$3,000 in the bank, owned no real estate.

When Ghanayem was confronted at trial with tape recordings and transcripts, the following colloquy took place:

> Q (Assistant United State's Attorney): Why did you arrange this meeting between Shunnarah and Agent Grant?

A (Defendant): Because Mr. Grant came by my shop several times and asked me to call ... I kept ignoring him and didn't want to do it. And then, finally, I called for him too, I figured I would make one phone call. He was bringing me the car to be fixed, and I figured I would make one call for him (Tr. 493) * * * I did this as -- I did this for Mr. Grant because he kept bothering me with it. I didn't want to call Mazen Shunnarah in the first place. I didn't want to be involved on drug deals, but he kept coming by, and kept coming by and pursuing" (Tr. 505)

REASONS FOR GRANTING THE PETITION

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED DUE TO THE SPECIAL AND IMPORTANT REASON THAT THE COURT OF APPEALS HAS RENDERED A DECISION IN DIRECT CONFLICT WITH ITS OWN PRECEDENT (United States v. Hollingsworth, 27 F.3d 1196 (7th Cir. en banc. 1994) AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ON THE LAW OF ENTRAPMENT (Jacobson v. United States, 112 S.Ct. 1535 (1992))

The prosecution failed, as a matter of law, to present any evidence to support to support the jury verdict that Khadir Ghanayem was predisposed, independent of the

government's acts of inducement and beyond a reasonable doubt, to violate the law of the conspiracy to possess cocaine with intent to distribute. The district court therefore granted Ghanayem's post-trial Rule 29(c) motion, relying on established precedent of this court and Seventh Circuit law. (Appendix A, pages A-35 to A-36). However, in reversing the district court's judgment of acquittal -- on the basis that there was "evidence of predisposition" -- the court of appeals emasculated its own precedent in United States v. Hollingsworth, 27 F.3d 1196 (7th Cir., 1994), ignored this court's decision in Jacobson v. United States, 112 S.Ct. 1535 (1992), upon its finding that: "the government proffered evidence that Ghanayem's character and reputation predis-- posed him to being involved in a drug trans- action." (Appendix B, page B-12) There was

no such evidence in the record. (See Appendix A, page 38) The district court correctly observed, "The government presented no evidence that Ghanayem had ever been involved in, arrested for, or convicted of any drug offense -- or any other offense * * * No evidence was presented to suggest that Ghanayem ever had anything to do with illegal drug trafficking." (Appendix A, page 11)

In the war on drugs, "it is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offenses does not defeat the prosecution" United States vs. Russell, 411 U.S. 423, 435 - 436, 93 S.Ct. 1637, 36 L.Ed.2d 366 1973. Government agents, however, may not originate a criminal design, implant in an innocent person the disposition to commit

a criminal act, and then induce commission of the crime so that the government may prosecute. Sorrells vs. United States, 287 U.S. 435 at 442, 53 S.Ct. 210 at 212, 77 L.Ed. 413 (1932). Such is the case here. Both this court and the United States Seventh Circuit Court of Appeals have ruled that when the government's quest for criminal convictions leads to the arrest, prosecution and conviction of an otherwise law-abiding citizen who, if left alone, would have never run afoul of the law, courts will intervene. Jacobson vs. United States, 112 S.Ct.at 1543 and United States vs. Hollingsworth, 27 F. 3d 1196 (7th Cir. 1994). Intervene even where juries have deliberated on contested entrapment evidence, deliberated with entrapment instruc-- tions and rendered verdicts of guilt. In the present case, the court of appeals

opinion ignores this precedent. Worse, it circumvents the law by finding predisposi-- tion evidence that never existed in the record of evidence.

Ghanayem defended the charge on the ground that DEA Agent Grant entrapped him. This was achieved through a series of repeated acts of going to the defendant's auto repair shop, engaging him to do lucrative repair work on the agent's expensive automobile, and constantly urging him to be the intermediary between the defendant's drug dealing cousin Shunnarah and Grant. After Ghanayem was acquitted of attempted possession of cocaine, but found guilty of con-- spiracy, the district court reviewed the record of evidence and granted defendant's Rule 29 motion finding that a rational jury could not have found Khadir Ghanayem guilty. Following the appropriate standard applica-

able to Rule 29, the district court undertook to determine whether the government proved any predisposition and found it presented no evidence to establish that element. (Appendix A, pages A-16 to A-32) See, United States vs. Groll, 992 F.2d 755, 759 (7th Cir. 1993), United States vs. Perez-Leon, 757 F.2d 866, 871 (7th Cir.), Gonzalez vs. United States, 474 U.S. 831 (1985), United States vs. Rivera-Espinoza, 905 F.2d 156, 158 (7th Cir. 1990).

Entrapment was established as Mr. Ghanayem showed (first) that he was induced to commit the offense and (second) the government could not prove that he was disposed to commit the offense prior to being approached by the government. See, Jacobson vs. United States, 112 S. Ct. at 22 1540. In Ghanayem's case both at trial and on appeal inducement was not in issue.

Predisposition, is not a purely mental state, the state of being willing to swallow the government's bait. (United States vs. Hollingsworth, 27 F.3d. 1196 at 1200). This court has stated, "the defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so." Further, "it is different when the defendant is not in a position without the government's help to become involved in illegal activity for the government 'may not provoke or create a crime, then punish the criminal, its creature'." (Hollingsworth 27 F.3d at 1200, citing Casey vs. United States, 276 U.S. 413, 423, 48 S.Ct. 373, 376, 72 L.Ed. 632 (1928). Ghanayem was not proven by the government to be a man of experience or

occupation to be a cocaine trafficker. The court of appeals' conclusion that he had a reputation or character for narcotic trafficking is belied by the record. He is a 29-year old auto repairman. He'd been an auto mechanic for 10 years when by happenstance -- because the DEA had targeted his cousin Mazen Shunnarah as a cocaine trafficker -- he was approached by the CI and DEA Agent Grant. Absent from the proof at trial -- and the Seventh Circuit's opinion -- is any evidence that he had ever before engaged in such activity. (See Appendix A, page 11)

Instead of predisposition evidence, the decision of the Court of Appeals focuses on defendant's acts and words **after** he had been entrapped by the efforts of the undercover agent to reach the questionable conclusion that Mr. Ghanayem possessed a "reputation"

and "character" for narcotics. In Jacobson vs. United States, 112 S.Ct. 1535 at 1541, this court ruled that the government must prove predisposition as independent -- not the product of the attention the government directed at the defendant. See Sorrells vs. United States, 287 U.S. 435 at 442 and Sherman vs. United States, 356 U.S. 369 at 372. The present court of appeals decision blindly ignores this fundamental, settled principal of law. At this case's inception, Grant and the CI went to the 1-2-3 Club in Chicago because the CI had told Grant that it was a known hangout for criminals. The main target of the investigation was Mazen Shunnarah. There, by pure accident, the CI saw Khadir and struck up a conversation with him. They talked only about auto repair. The next contact with Ghanayem took place at his shop where Grant,

acting in an undercover capacity, and the CI, went there to meet with him in an effort to have him contact his cousin Shunnarah. The defendant discussed automobile repair, but the agent and CI steered the conversation to narcotics. The defendant told him that his cousin had moved to Lexington, Kentucky. He had not spoken with Shunnarah for six months.

Then, and in all subsequent times, each time the defendant tried to discuss the repair of the agent's car, Grant repeatedly turned the discussion to narcotics. While, according to Grant, the defendant would attempt to arrange a cocaine transaction and would make telephone calls, the government's tape recordings, transcripts and the testi-- mony of the defendant established that Ghanayem had no prior experience nor inclination to engage in a cocaine deal. (Appen

dix A, page A-25)

The district court examined the record and ruled Grant's testimony could not be taken in a vacuum considering the taped conversations introduced by the government. These tapes, which the government introduced as authentic, undercut Agent Grant's testimony regarding predisposition on the part of Ghanayem. The May 7, 1993, tape recording proved that after discussing repairs on the car Grant broached the subject of cocaine (Gov't. Exhibit 9 at 4), to which defendant stated that he had been unable to reach Shunnarah when he stammered:

> "He never called me, a was wanting a...wasn't able to get a hold of me, he couldn't get a hold of it."

When the defendant turned the discussion back to car repairs, Grant turned it back to cocaine, asking "Do you know anyone else [other than Shunnarah] that might be inter-

ested?" (Government Exhibit 9 at 6), to which the defendant replied, "not off hand. Only one person. You..this is the only person that I know, that you know, he's a he's a close friend of mine..." (Government Exhibit 9 at 6). In the view of the district court, this established that Ghanayem was not an experienced drug dealer and was without connections to his cousin's drug business. Rather, Khadir Ghanayem was a confused and ambivalent person, in over his head. The government tape recordings disproved that the defendant promptly accepted Grant's offer to arrange a drug deal. (Appendix A, pages A-24 to A-32)

The tape recorded conversations demonstrated that on two occasions Ghanayem deflected drug conversations back to the car repairs, but Grant repeatedly turned the discussion back to cocaine. Ghanayem was

clearly unable or unwilling to contact Shunnarah. The district court thus ruled that he would not have done so without the repeated urging of Agent Grant. Significantly, Ghanayem did not call the informant or Agent Grant in any of the intervening weeks between April and May. Judge Conlon concluded that it was only after Agent Grant overcame defendant's reluctance that Ghanayem finally followed through by contacting his cousin to set up a deal. (Appendix A, pages A-28 to A-29)

On May 12, 1993, when Grant visited the shop, Ghanayem discussed car repairs, but Grant again brought up the subject of drugs. In this and subsequent meetings, defendant, having been overcome by the agent, discussed the possibility of multiple deals and requested a $1000.00 commission on the transaction. While a reasonable jury could

conclude that Ghanayem was a willing participant in the drug conspiracy after May 12, this occurred over two months after many discussions. While defendant ultimately became a participant in the drug deal, that does not support a reasonable inference that he was predisposed to participate. (See United States vs. Evans, 924 F.2d 714, 716 (7th Cir. 1991)). The court of appeals use of post-entrapment words and conduct to establish predisposition is contrary to law. In Jacobson vs. United States 112 S.Ct. 1535, 118 L.Ed.2d 174 (11992), the defendant was prosecuted for buying child pornography. The pornography was furnished to him by government agents, who were aware of his interest in kinky sex because he had brought magazines that catered to this interest. Significantly, Jacobson, like Khadir Ghanayem, at no time exhibited a reluctance to

purchase such magazines provided to him by agents of the government. The facts of Jacobson reveal that the government, as here, did not offer Jacobson any inducements to buy pornographic magazines or threaten him with harm if he failed to buy them. This court found that while the evidence indicated a generic inclination to act within a broad range, not all of which is criminal, such does not prove nor does it establish predisposition. This court ruled:

> "Petitioner's ready responses to these solicitations cannot be enough to establish beyond a reasonable doubt that he was predisposed prior to the government acts intended to create predisposition, to commit the crime of receiving child pornography through the mail...the evidence that Petitioner was ready and willing to commit the offense came only after the government had devoted two and one half years to convincing him that he had or should have the right to engage in any behavior that proscribed by law" (112 S.Ct at 1543).

Here, the district court, applied the above standard and that of the Seventh Circuit

(United States vs. Hollingsworth, 27 F.3d. 1196 (7th Cir. en banc. 1994)) in ruling that law enforcement officials went too far when they "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." (Sorrells vs. United States, 287 U.S. 435 at 442). The present decision stands in conflict with such precedent. Petitioner was entrapped to commit a crime which without government inducement would never have committed.

CONCLUSION

The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	93 CR 510-1
-vs-	)	
	)	Judge Conlon
	)	
KHADIR GHANAYEM,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Following a jury trial, Khadir Ghanayem was convinced of conspiracy to possess cocaine, with intent to distribute, and was found not guilty of attempt to possess cocaine, with intent to distribute.[1] Ghanayem now moves for judgment of

[1]Ghanayem's co-defendant, Christ Theodosopoulos, also was found guilty of conspiracy to possess cocaine and not guilty of attempt to possess cocaine. Theodosopoulos' motion for judgment of acquittal was granted immediately following the return of the guilty verdict. See Fed. R. Crim. P. 29(b).

acquittal, pursuant to Fed. R. Crim. P. 29(c), contending, inter alia, that the government failed to prove beyond a reasonable doubt that he was not entrapped. Ghanayem moves in the alternative for a new trial, pursuant to Fed. R. Crim. P. 33.

BACKGROUND

Ghanayem was charged in a two-count indictment, alleging that between March 30, 1993 and May 23, 1993, Ghanayem was part of a conspiracy to possess, with the intent to distribute, kilogram quantities of cocaine. At trial, evidence was presented that Ghanayem: (a) met with undercover agent William Grant of the Drug Enforcement Agency about setting up a large cocaine purchase; (2) discussed the particulars of the transaction with agent Grant; and (3) introduced agent Grant to

his cousin, Mazen Shunnarah, for the purposes of consummating the deal. On October 20, 1993, after a three-day trial, the jury found Ghanayem guilty of conspiracy to possess cocaine and not guilty of attempt to possess cocaine. Ghanayem's motion in open court for judgment of acquittal was denied. In his post-trial motions, Ghanayem again moves for judgment of acquittal, raising numerous challenges to his conspiracy conviction. Ghanayem moves in the alternative for a new trial.

DISCUSSION

1. Motion For Judgment Of Acquittal

In challenging a conviction under Fed. R. Crim. P. 29(c), Ghanayem "carries a heavy burden." United States v. Campbell, 985 F.2d 341, 344 (7th Cir. 1993). Ghanayem must show that, viewing the

evidence in the light most favorable to the prosecution, a rational jury could not have found him guilty. See United States v. Ortiz, 5 F.3d 288, 292 (7th Cir. 1993). In reviewing Ghanayem's conviction, the court does not assess the credibility of witnesses, weight evidence, or draw inferences -- these are solely jury functions. See United States v. Marquardt, 786 F.2d 771, 780 (7th Cir. 1986). Instead, the court must determine whether the government has presented evidence on every element of its case sufficient for the jury to have found Ghanayem guilty beyond a reasonable doubt. Id.

Chief among Ghanayem;s challenges is that his conviction was the result of entrapment. Ghanayem contends that a rational jury could not have found him

guilty beyond a reasonable doubt because he established the defense of entrapment as a matter of law. Ghanayem asserts that the government presented no evidence of prior disposition to commit the crime, while he presented ample evidence of inducement. He concludes that the government's failure to prove predisposition is sufficient to warrant his acquittal.

2. Entrapment/Predisposition

The entrapment defense is based on the premise that "the function of law enforcement officials...does not include the manufacturing of crime." Sherman v. United States, 356 U.S. 369, 372 (1958). Accordingly, government agents may not "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Sorrells

v. United States, 287 U.S. 435, at 442 (1932). The defense of entrapment is designed to "prevent the police from turning a law-abiding person into a criminal." United States v. Evans, 924 F.2d 714, 717 (7th Cir. 1991).

Entrapment is established if: (1) the defendant shows that he was induced to commit the crime; and (2) the government cannot prove beyond a reasonable doubt that the defendant was disposed to commit the crime prior to being approached by the government. See Jacobson v. United States, _____ U.S. ____, 112 S.Ct. 1535, 1540 (1992); United States v. Groll, 992 F.2d 775, 759 (7th Cir. 1993). In practice, the inducement and predisposition and elements of the entrapment defense tend to merge. See Groll, 992 F.2d at 759 ("inducement and predisposi-

tion are not wholly distinct from each other"); United States v. Evans, 924 F.2d 714, 717 (7th Cir. 1991) (the entrapment test "suggests a certain semantic disarray"). The central inquiry for the jury was whether Ghanayem possess "something like predisposition in the sense of inordinate willingness to participate in criminal activity. Evans, 924 F.2d at 717.

The government does not seriously dispute that Ghanayem was induced to commit the crime for which he was convicted. The government's brief virtually concedes that there was some inducement in this case by declaring equivocally that there was some inducement in this case by declaring equivocally that there was "almost no inducement by government agents." Response at 4 (emphasis added).

As discussed below, there was substantial evidence of inducement presented by the government's evidence. Hence, the sole issue in this case is predisposition. See Jacobson, 112 S. Ct. at 1540-41 n. 2 (when government does not dispute inducement, the sole issue is whether government carries its burden on predisposition) The burden was on the government to establish beyond a reasonable doubt Ghanayem's predisposition to engage in drug trafficking. See Id. at 1540.

Ghanayem argues that the government did not meet its burden of proving predisposition because it presented no evidence to establish prior intent. Motion ¶5. The government was not required to present direct proof that Ghanayem was inclined to commit the offense; Ghanayem-'s predisposition to engage in the drug

conspiracy could be established through circumstantial evidence. In Jacobson v. United States, ____ U.S. ___, 112 S.Ct. 1535, 1541 (1992), the Supreme Court found that predisposition may be inferred from the circumstances of the crime. The Court wrote that when agent offer a defendant the opportunity to commit a crime and the defendant "promptly avail(s) himself of this criminal opportunity," the entrapment defense fails as a matter of law. Thus, at a minimum, the government was required to establish circumstantially that Ghanayem was included to participate in a conspiracy to distribute cocaine.

In determining whether a defendant was predisposed to commit an offense, the Seventh Circuit has relied on factors such as an overall ssessment of the

defendant's character, evidence of prior offenses, an apparent reluctance to commit the crime, and the nature of the government inducement. See United States v. Perez-Leon, 757 F.2d 866, 871 (7th Cir.), cert. denied sub nom. Gonzalez v. United States, 474 U.S. 831 (1985); United States v. Rivera-Espinoza, 905 F.2d 156, 158 (7th Cir. 1990). The Seventh Circuit has found that there is a "presumption of predisposition resulting from the criminal undertaking." United States v. Groll, 992 F.2d 755, 759 (7th Cir. 1993). However, the burden is ultimately on the government to prove predisposition beyond a reasonable doubt. Id.

On Ghanayem's motion for acquittal, the court must determine whether the government presented sufficient evidence from which the jury could conclude beyond

a reasonable doubt that Ghanayem was predisposed to engage in a drug conspiracy. Upon reviewing the evidence presented, it is clear that the government did not present sufficient evidence.

3. The Government Predisposition Evidence

a. The government presented no evidence that Ghanayem had a previous drug history

The first factor routinely relied upon by the Seventh Circuit weighs heavily against a finding of predisposition. The government presented evidence that Ghanayem had ever been involved in, arrested for, or convicted of any drug offense -- or any other offense. Indeed, no evidence was presented to suggest that Ghanayem ever had anything to do with

illegal drug trafficking.[2] The lack of evidence of prior drug dealing should have suggested to the jury that Ghanayem was not inclined to participate in a drug transaction before he was approached by agent Grant.

b. The government admittedly induced Ghanayem to arrange a cocaine deal

The second factor also should have suggested a lack of predisposition. The government clearly (and admittedly) induced Ghanayem to set up a drug deal. In an effort to arrange a cocaine sale to Shunnarah, the government sought out Ghanayem. Shunnarah's cousin, in a "re

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[2]On cross-examination, agent Grant volunteered his belief that Ghanayem had once been arrested for marijuana possession. Tr. at 224. This unsubstantiated statement was insufficient to support a reasonable inference that Ghanayem had previously been involved in a drug trafficking.

verse buy" undercover operation. The entire undercover operation was designed to catch Shunnarah; Ghanayem was used as bait to catch his cousin. The party that initiated negotiations to sell cocaine and actually attempted to sell cocaine was the government. The Seventh Circuit has held:

> The stronger the inducement, the more difficult it is for the government to prove that the defendant would have committed the crime on a different occasion had the particular inducement not been offered.

United States v. Hollingsworth, 9 F.3d 593, 597 (7th Cir. 1993). As agent Grant testified, the reverse buy transaction was arranged to apprehend Shunnarah, not Ghanayem; the government was not even investigation Ghanayem when the undercover operation was initiated -- it had no information that Ghanayem was involved

in Shunnarah's drug syndicate. See Tr. at 110-11. Given the lack of evidence of Ghanayem's involvement in any previous drug transaction, the government's orchestration of the sale of cocaine to Shunnarah weighs heavily against a finding of predisposition by Ghanayem.

c. The government did not present sufficient circumstantial evidence to support a finding that Ghanayem was predisposed to arrange a drug deal

The first two factors weigh against a finding that Ghanayem was predisposed to engage in the drug conspiracy: the government did not present evidence that Ghanayem was previously involved in drug offenses but did present evidence that Ghanayem was a pawn in a game designed to apprehend Shunnnarah. However, the government may establish that Ghanayem was predisposed to arrange the cocaine trans-

action through the circumstances of the offense -- particularly through evidence of Ghanayem's behavior after he was approached by government agents. See United States v. Jacobson, ____ U.S. _____, 112 S.Ct. 1535, 1540 (1992). The government could show circumstantially that Ghanayem was likely to commit a drug offense even without government involvement. The question is whether Ghanayem was or was not the type of person "who if left to his own devices probably would never have run afoul of the law." United States v. Hollingsworth, 9 F.3d 593, 598 (7th Cir. 1993) (citation and emphasis omitted).

In order to determine whether the government presented sufficient evidence that Ghanayem was predisposed to participate in a drug transaction, the court

examines the evidence presented to the jury regarding the earliest meetings between Ghanayem and agent Grant. The inquiry is not whether Ghanayem ultimately became an active and willing participate in the drug deal, but whether he was predisposed to be involved regardless of government intervention. The court must determine whether there was sufficient evidence from which the jury could have concluded that Ghanayem was inclined to participate in a drug transaction before he was approached by government operatives.

i. The initial meeting.

Agent Grant and Ghanayem both testified about the first two times that they

came into contact.[3] Agent Grant testified that he first met Ghanayem at the 1-2-3 Club on the night of March 30, 1993. Agent Grant and a confidential informant "the informant" entered the bar at about 10:30 p.m. The informant spotted Ghanayem, and pointed him out to agent Grant. Ghanayem and the informant waived to each other, and then the informant and agent Grant came over to Ghanayem and struck up a conversation. Tr. at 110-12.

Agent Grant testified that upon first speaking with the informant, Ghanayem stated that he was no working ata different auto repair shop. The conver-

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[3]The first two meetings between Ghanayem and agent Grant were not tape-recorded. Agent Grant testified that the initial meeting was not taped because it took place at a crowded bar, and that it was impossible to tape a conversation there. TR. at 112.

sation then turned to Ghanayem's cousin, Mazen Shunnarah, and Ghanayem stated that Shunnarah had moved to Lexington, Kentucky. Finally, Ghanayem told the informant that if he needed anything, he should call Ghanayem at work. Ghanayem gave the informant his business card. According to agent Grant, the conversation lasted about twenty minutes. Tr. at 112-13.

Ghanayem testified that he met with the informant on the night of March 30, 1993, but did not meet agent Grant that night. Ghanayem testified that the informant asked about Shunnarah. Ghanayem responded that he had not spoken to Shunnarah for six months because he (Ghanayem) had been in Jordan for his marriage. Ghanayem testified that the conversation switched to cars. Ghanayem told the

informant about his new job at an auto body shop and gave the informant his business card to solicit car repair work. According to Ghanayem, he did not discuss Shunnarah with the informant for more than a few moments. Tr. at 468-69.

ii. The first cocaine discussion

Grant and Ghanayem next met on April 22, 1993. Agent Grant testified that at about 12:30 p.m., he and the informant visited Ghanayem at George's Automotive Repair, where Ghanayem works.[4] Agent Grant arrived in a Mercedes Benz convertible and asked to have the windshield repaired. After the conversation regarding the repairs concluded, the informant asked if Ghanayem knew of anyone

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[4]This meeting was tape-recorded. However, the tape recording is inaudible. Tr. at 116-17.

interested in buying cocaine. According to agent Grant, Ghanayem cautiously looked around and then asked how much agent Grant had to sell. After telling Ghanayem that he had five kilos, Ghanayem asked about quality and price. Agent Grant testified that Ghanayem said that he knew of someone who might be interested in buying the cocaine, and he would try to reach him. According to agent Grant, at the end of this meeting there was an understanding that Ghanayem would attempt to arrange a cocaine transaction and would call the informant to confirm the deal. Tr. at 115-20.

Ghanayem's testimony regarding the April 22 meeting sharply contradicts agent Grant's version. Ghanayem testified that on April 22 he met agent Grant for the first time. Ghanayem testified

that agent Grant asked to have the windshield of his Mercedes repaired. According to Ghanayem, agent Grant then turned the conversation to cocaine by mentioning to Ghanayem that he had some cocaine that he was interested in selling. Ghanayem testified that he responded that he does not buy, sell, or do drugs. The informant then brought up Shunnarah, and asked if Ghanayem could contact him. Ghanayem did not testify as to his response to the informant's question regarding Shunnarah. Tr. at 469-71.

Based on this evidence alone, the jury reasonable could have concluded that Ghanayem was predisposed to engage in a conspiracy to purchase cocaine. It was the jury's responsibility to weigh conflicting testimony and to draw reasonable inferences from the evidence. the jury

was free to attach more credibility to agent Grant's testimony than to Ghanayem-'s and to resolve all contradictions in agent Grant's favor.[5] According to agent Grant, Ghanayem was amenable to setting up a cocaine transaction from the start: (1) as soon as a cocaine deal was suggested, Ghanayem asked about quantity, quality, and price; and (2) Ghanayem stated that he know of someone who would

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[5]A number of courts have held that evidence that a defendant is initially reluctant to engage in criminal activity is insufficient to support a reasonable inference that he was not predisposed to engage in the crime. See United States v. Perez-Leon, 757 F.2d 866 872 (7th Cir.), cert. denied sub nom., Gonzalez v. United States, 474 U.S. 831 (1985); United States v. Perez-Reyes, 754 F.Supp. 637, 642 (N.D. Ill.1991). It should be noted that these decisions were issued before the Supreme Court altered the burden of proof in entrapment cases in United States v. Jacobson.

be interested in buying the cocaine, and that he would arrange a deal. Taking this testimony in a vacuum, the jury was presented with sufficient evidence upon which to find that Ghanayem was predisposed to arrange a cocaine deal. However, the testimony of agent Grant and Ghanayem must be considered together with the unimpeached taped conversations introduced by the government. These tapes, which the government introduced into evidence as authentic representations of later recorded conversations, effectively undercut the weight and realizability of agent Grant's testimony about Ghanayem's behavior at the earlier meetings.[6] In

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[6]Generally a jury is free to discount taped evidence and to rely on live testimony instead. However, the government -- the party that introduced and authenticated the tapes -- specifically vouched for the authenticity and reli-

light of the tapes, the government's evidence was insufficient to support a finding of predisposition.

iii. The taped meetings

After the initial meeting at the body shop, Ghanayem did not call the informant to confirm a deal -- as Grant testified Ghanayem had agreed to do. Two weeks later, on May 7, 1993, agent Grant visited Ghanayem at work. The conversation on May 7 was taped, as were the ensuing conversations between agent Grant and Ghanayem, and the tapes were received in evidence. Gov. Exs. 9-15. The tape of the May 7 meeting unambiguously shows that Ghanayem was not eager to participate in a drug transaction at that meet-

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ability of the tapes and for the accuracy of their substance. By introducing the tapes into evidence, the government is deemed to have admitted their content.

ing with agent Grant. Based on Ghanayem-'s taped statements at the May 7 meeting, agent Grant's testimony regarding Ghanayem's behavior at the April 22 meeting is of questionable reliability and accuracy. Ghanayem's words and behavior at the May 7 meetings, -- behavior that is fully documented by the government's own taped exhibits -- belies agent Grant's testimony that Ghanayem was easily amenable to arranging a cocaine deal at the April 22 meeting. The tapes should raise a reasonable doubt in the mind of a rational juror concerning what Ghanayem may have said or done at the two earlier unrecorded meetings. Because of the clear contradictions between agent Grant's testimony about Ghanayem's behavior and the taped evidence, the government did not present substantial evidence of Ghan-

yem's predisposition to engage in a drug conspiracy.[7]

The May 7 tape establishes the following: After discussing repairs to the car for few minutes, agent Grant broached the subject of the cocaine deal. Gov. Ex. 9 at 4. Ghanayem stated that he had been unable to reach Shunnarah. Ghanayem stammered that:

> He never called me, I was wanting a . . . wasn't able to get a hold of me, he couldn't get a hold of it.

Id. Agent Grant told Ghanayem that Grant would be receiving more cocaine to set up

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[7]In reaching this conclusion, the court does not weight the contradictory testimony (which of course is a jury function). Rather, the court finds that in light of the contradictions between the government's taped evidence and agent Grant's testimony, the government simply did not present sufficient evidence to establish Ghanayem's predisposition beyond a reasonable doubt.

another deal in the future. Ghanayem answered less than enthusiastically, "whenever, whenever." Gov. Ex. 9 at 5. Ghanayem then turned the conversation back to car repairs. Agent granted opened the cocaine discussion again by asking: "Do you know anyone else [other than Shunnarah] that might be interested?" Gov. Ex. 9 at 6. Ghanayem replied:

> Not off hand only one person. You . . . this is the one person that I know that, you know, he's a he's a close friend of mine . . .

Gov. Ex. 9 at 6. These statements did not reasonably appear to be those of an experienced drug dealer who already had strong connections to his cousin's drug business and who was already interest in pursuing a transaction. Rather, the statements appear to be those of a confused and ambivalent person in over his

head. More importantly, these could not reasonably be viewed as the statements of the same person who, according to agent Grant's testimony, two weeks earlier had promptly and eagerly accepted agent Grant's offer to arrange a drug transaction.

Numerous facts about this taped conversation raise reasonable doubts concerning Ghanayem's predisposition. First, Ghanayem was clearly unable or unwilling to contact Shunnarah before the May 7 meeting with agent Grant. Ghanayem was either hesitate to call Shunnarah or he simply could not reach him easily. Ghanayem's reluctance or inability to reach his drug-dealing cousin, even at the request of a customer (Grant) who was giving him a lucrative car repair job, suggests that he had not previously at tempted to arrange a drug deal. In addi-

tion, Ghanayem had not called the informant or agent Grant in the intervening weeks. The government's tapes establish that Ghanayem initially played a passive and disinterested role in agent Grant's suggested drug transaction, despite Ghanayem's financial interest in accommodating an important car repair customer. Only after agent Grant met with Ghanayem three times, and visited Ghanayem at work twice, did Ghanayem finally follow through by contacting his cousin to set up a drug deal.

Ghanayem's demeanor at this meeting, as reflected on tape, also suggests that he was inexperienced and uneasy in negotiating a drug transaction. During the conversation, Ghanayem twice deflected agent Grant's drug conversation back to car repairs --a subject with which Ghana-

yem clearly was more comfortable. Nevertheless, agent Grant repeatedly returned the discussion to cocaine. On the basis of the taped evidence, a reasonable jury would have doubted that Ghanayem's ultimate involvement was due to his own predisposition to engage in a drug deal rather than to agent Grant's tenacity. In light of the taped evidence, agent Grant's testimony regarding Ghanayem's initial eagerness to set up a drug deal cannot reasonably be viewed as substantial evidence supporting a finding of predisposition beyond a reasonable doubt.

Finally, the May 7 tape raises a reasonable doubt whether Ghanayem was interested in buying drugs at all. A reasonable jury listening to the tapes should have concluded that there was a questions whether Ghanayem's real inter-

est was in repairing agent Grant's expensive car. Ghanayem testified that most of the cars he fixed were five to seven years old with no warranties. In contrast, agent Grant arrived at the body shop in a $90,000 Mercedes Benz convertible that needed fairly expensive repairs. Tr. at 470. Ghanayem's real predisposition may have been to try to make money through legal channels, i.e., by fixing agent Grant's expensive car. During the May 7 meeting, Ghanayem twice attempted to turn agent Grant's drug-related conversation back to cars generally or auto repairs specifically. Agent Grant persistently returned the discussion to drugs. A rational jury listening to taped evidence in which Ghanayem clearly attempted to deflect the conversation away from drugs would conclude that there

is a reasonable doubt Ghanayem;s predisposition: did Ghanayem go along with a drug deal only because he was trying to accommodate a customer who was offering him lucrative car repair work? The jury could not reasonably overlook this direct, undisputed, government-authenticated evidence in favor of agent Grant's contradictory testimony.[8]

iv. Later meetings

Five days later, on May 12, 1993, agent Grant visited Ghanayem at the body shop. At this meeting, Ghanayem discussed car repairs until agent Grant brought up the subject of drugs. By the time of this meeting, Ghanayem had spoken with Shunnarah and was talking about price and quantity. Gov. Ex. 10 at 5-8.

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[8]See note 7.

In this and the subsequent meetings, Ghanayem discussed the possibility of multiple deals and requested a $1,000 commission on a $20,000 transaction. Thus, it was reasonable for the jury to conclude that Ghanayem was a willing participant in a drug conspiracy after May 12. However, the May 27 meeting occurred nearly two months after Ghanayem first met agent Grant, and on agent Grant's third visit to Ghanayem's place of employment. Although Ghanayem ultimately became an active participant in a drug transaction, that fact alone does not support a reasonable inference that he was predisposed to participate or that he was not entrapped initially. See United States v. Evans, 924 F.2d 714, 716 (7th Cir. 1991) (if defendant "was indeed entrapped, it is irrelevant that the

entrapment was so effective as to make him not only a wiling but an eager participant"). There is ample evidence from which to conclude that Ghanayem actively participated in a drug conspiracy after May 12. However, in light of the May 7 tape, which directly shows Ghanayem's disinterest and inexperience in drug transactions, agent Grant's contradictory testimony as to Ghanayem's predisposition does not constitute substantial evidence that Ghanayem was predisposed to arrange a cocaine transaction. The government presented no other evidence of predisposition. Accordingly, there is insufficient evidence upon which the jury could have based a finding beyond a reasonable doubt that Ghanayem was predisposed to participate in a drug sale.

d. Recent decisions

The conclusion that there is insufficient evidence to establish predisposition is supported by recent case law. In Jacobson v. United States, ____ U. S. ____, 112 S.Ct. 1535, 1541 (1992), the Supreme Court ruled that it was improper to find the defendant predisposed to commit an offense in light of a two-year campaign by the government to induce criminal actions. Similarly, in United States v. Groll, 992 F.2d 755, 759 (7th Cir. 1993), the Seventh Circuit found that a defendant was entitled to withdraw a guilty plea in light of evidence that a government agent called the defendant every day for a month, acted in a threatening and belligerent manner, and ignored the defendant's protestations that she was too busy to sell him drugs. Finally,

in United States v. Hollingsworth, 9 F.3d 593 (7th Cir. 1993), the Seventh Circuit ruled that defendants in a money-laundering operation had been entrapped into committing the crime, in light of evidence that government agents "inveigled" them into the money-laundering scheme. The Hollingsworth court found that the defendants "would not have acted had the government not persuaded them to act. The government manufactured a crime; it turned bad thoughts into bad acts." Hollingsworth, 9 F.3d at 600.[9]

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[9]In many earlier decisions, the Seventh Circuit has upheld convictions in the face of entrapment challenges. However, in these decisions, the Seventh Circuit placed an initial burden on the defendant to prove that he was not predisposed to commit the offense. See, e.g., United States v. Rivera-Espinoza, 905 F.2d 156, 158 (7th Cir. 1990). The Supreme Court's Jacobson decision overruled these cases.

In each of these cases, the court found that there was a reasonable doubt regarding the defendant's predisposition in light of government pressure to engage in the criminal activity. In Hollingsworth, the Seventh Circuit articulated a crucial point about predisposition:

> A reasonable jury could have found the defendants "predisposed" if the term refers merely to a psychological state of willingness to break the law. But if the concept of predisposition is to serve the purpose of the doctrine of entrapment, it must mean more -- must connote opportunity (what we are calling "readiness") as well as willingness.

Hollingsworth, 9 F.3d at 599. In this case, a rational jury listening to the tape could not have concluded beyond a reasonable doubt that Ghanayem was both willing and ready to engage in drug trafficking before or when he met agent Grant

The taped evidence strongly suggests that agent Grant "manufactured" the transaction -- agent Grant persuaded Ghanayem to do something that he likely would not have done otherwise. Upon listening to the tapes, the only evidence supporting a finding that Ghanayem was predisposed to engage in a drug deal was agent Grant's testimony. However, that testimony is seriously called into question by the cold, undisputed facts documented by the government's tapes. Taking the testimony and the tapes together, the government's evidence of predisposition is insufficient.

e. Conclusion

Based on the evidence presented by the government, a reasonable jury would have found that there is a real question whether the government pressured Ghanayem

into negotiations to buy cocaine despite Ghanayem's initial lack of interest or disinclination to be involved in the deal. The government presented no evidence that Ghanayem had been involved in drugs -- or any other criminal enterprise -- previously. In addition, the government presented evidence that the crime was orchestrated as a reverse buy designed to apprehend not Ghanayem, but his cousin Shunnarah. Finally, the government presented agent Grant's testimony regarding Ghanayem's predisposition. However, agent Grant's testimony was undercut by the government's taped evidence. The government's evidence was insufficient; a rational jury could not have concluded beyond a reasonable doubt that Ghanayem was predisposed to participate in agent Grant's sale of cocaine to

Shunnarah.

In light of the government's failure to present sufficient evidence concerning Ghanayem's predisposition, the court finds that as a matter of law there is a reasonable doubt whether Ghanayem would have engaged in criminal activity had he not been repeatedly requested by a government agent to do so. There is a reasonable doubt whether Ghanayem's participation in the cocaine deal was the result of "the creative activity of [government] officials." Sorrells v. United States, 287 U.S. 435, 451 (1932). The government has failed to establish beyond a reasonable doubt that Ghanayem was predisposed to participate in a drug conspiracy. Accordingly, Ghanayem's conviction must be vacated.

4. Other Challenges

In light of the finding that Ghanayem's conviction must be vacated because of insufficient evidence of predisposition, it is not necessary to address Ghanayem's other challenges to his conviction or his motion for a new trial.

CONCLUSION

Defendant Khadir Ghanayem's motion for reconsideration of the denial of his motion for judgment of acquittal is granted. The guilty verdict on Count I of the indictment is vacated. Any bond Ghanayem posted is exonerated.

ENTER:

Suzanne B. Conlon
United States District
Judge

January 20, 1994

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-3831, 94-1384 & 94-2417

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CHRIST THEODOSOPOULOS and KHADIR GHANAYEM,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KHADIR GHANAYEM,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 CR 510—**Suzanne B. Conlon**, *Judge.*

ARGUED JANUARY 9, 1995—DECIDED FEBRUARY 28, 1995

Before FLAUM and EASTERBROOK, *Circuit Judges*, and PAINE,* *District Judge.*

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* The Honorable James C. Paine, of the United States District Court for the Southern District of Florida, sitting by designation.

FLAUM, *Circuit Judge.* A jury convicted defendants Khadir Ghanayem and Christ Theodosopoulos of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846, and 18 U.S.C. § 2. After trial, the district court granted both defendants' motions for judgment of acquittal pursuant to Fed. R. Crim. P. 29, concluding that the government had entrapped Ghanayem and had failed to prove that Theodosopoulos was a knowing participant in the conspiracy. The district court also denied Ghanayem's motion for a new trial pursuant to Fed. R. Crim. P. 33. The government appeals the district court's judgment of acquittal and Ghanayem appeals the denial of his motion for a new trial. We now reverse the judgments of acquittal, affirm the denial of Ghanayem's new trial motion, reinstate the jury verdicts, and remand for sentencing.

I.

In March, 1993, as part of a Drug Enforcement Administration ("DEA") investigation, an individual cooperating with the DEA initially identified several people who were allegedly known drug dealers, and a location—the One, Two, Three Lounge in Chicago—where these persons congregated. On March 30, 1993, undercover DEA Special Agent William Grant and the informant went to this lounge and met defendant Khadir Ghanayem. The informant recognized Ghanayem as a cousin and drug associate of Mazen Shunnarah, one of the targets of the investigation. During the course of their conversation, Ghanayem handed the informant his business card and told him to contact him at his work at George's Auto Shop ("George's") if he needed anything.

On April 22, 1993, the informant and Grant met Ghanayem at George's. Although Grant attempted to make an audio tape of the conversation, the recording was virtually inaudible. Grant testified that they first discussed replacing a windshield on Grant's Mercedes Benz. During the conversation, the informant asked Ghanayem if he was interested in "buying anything," apparently alluding to

drugs. When Ghanayem asked what Grant had available, Grant responded that he had "five keys"—referring to five kilograms of cocaine. Grant testified that Ghanayem asked about the price and that Grant told Ghanayem that he could purchase cocaine for $20,000 per kilogram. Grant also testified that Ghanayem stated that he would call the informant the next day, although no such call was made. In contrast to Grant's version of the events, Ghanayem testified that Grant brought up the cocaine and a potential deal, to which Ghanayem responded that he did not buy, sell, or do drugs.

The next contact occurred on May 7, 1993, when Grant again went to George's. Grant testified that along with discussing his car windshield, Ghanayem stated that he had not yet reached his cocaine contact, who he referred to as "Mazen." Grant gave Ghanayem his pager number and agreed on the code "111" for future contacts. Records indicate that calls were placed using Ghanayem's cellular telephone to Shunnarah's tavern in Lexington, Kentucky on May 11, 1993.

On May 12, 1993, Grant and Ghanayem met again at George's. Grant testified that Ghanayem informed him that he had a purchaser who wanted three kilograms of cocaine at $20,000 per kilogram. Grant also testified that when asked when his contact would be ready, Ghanayem made a long distance telephone call to area code 606—which includes Lexington—asked for "Mazen," and then had a brief conversation with Mazen Shunnarah. Ghanayem then told Grant that he (Ghanayem) would purchase one kilogram of cocaine, that Mazen would purchase three more, and that they would contact Grant when they were ready to make the purchase.

The next meeting between Ghanayem and Grant took place on May 17, 1993. After discussing arrangements for fixing the Mercedes Benz, Ghanayem informed Grant that he had been having trouble reaching his contact and that he would continue to try to call him. Ghanayem's cellular telephone records indicate that telephone calls were again placed to Shunnarah's tavern in Lexington on May 18,

1993. On the morning of May 20, 1993, Grant dropped off his car at the shop. He testified that later that afternoon Ghanayem paged him, using the agreed-upon "111" code. Grant testified that he returned to the auto shop, where he observed a light blue Audi, and met with Ghanayem and Shunnarah. Grant then testified that Ghanayem told him that he did not want to be involved in the negotiations with Shunnarah but that he wanted Grant to add $1,000 to the purchase price for him. Grant, Ghanayem and Shunnarah then drove around the area in Shunnarah's Audi, discussing Ghanayem's search for a consistent source of cocaine. Shunnarah and Grant agreed on a price of $21,000 per kilogram and on meeting at the auto shop to complete the deal.

Later that evening, Grant and Ghanayem changed the transaction meeting location to the Plush Pup restaurant at 8:30 p.m. Grant drove to the restaurant with Special Agent Bernie Bolf, who had brought the 5 kilograms of cocaine in the trunk of his car. Shunnarah told Grant that he had the money but that he first wanted to see the cocaine. Grant and Shunnarah walked to Bolf's trunk, where Shunnarah examined one of the kilogram packages of cocaine and concluded "that would be fine." Shunnarah told Grant that he would return in ten minutes with the money. While Grant and Ghanayem waited inside the restaurant for Shunnarah to return, they received a phone call from Shunnarah stating that the person with the money for the cocaine would not give him the money until he saw the cocaine. Grant, Ghanayem, and Shunnarah agreed that they would go to the A to Z Auto Body in River Grove where they could meet the money source.

At the Body Shop, Grant testified that he saw Shunnarah and fifteen unknown males. Grant indicated that Shunnarah told him that the purchaser of the cocaine, who he pointed to and identified as "Chris," would not deliver the $21,000 purchase money until he saw the cocaine.[1] Grant,

[1] The individual to whom Grant pointed subsequently was identified as co-defendant Christ Theodosopoulos.

saying that he did not do business this way, refused to show the cocaine, and left the shop. As Grant was leaving, Shunnarah approached him and told him that he would drive to Lexington and get his own money to purchase five kilograms of cocaine. The following day, Grant met with Ghanayem at George's to discuss the repair of Grant's windshield and paid Ghanayem $450 for the repairs. During that meeting, Grant testified that he complained about the dealings the previous evening.

On May 22, 1993, Ghanayem called Grant and told him that they were ready to complete the deal. Grant stated that he could not do it until the next day. The following day, May 23,[2] Ghanayem contacted Grant and told the agent to meet him in the parking lot of Chicago Billiards on Irving Park Road at 10:30 a.m. At approximately 11:00 a.m., Grant met Ghanayem and Shunnarah, who told the officer that he was having a difficult time waking up the individual with the money, who Shunnarah identified by the name "Chris." Telephone records from Ghanayem's cellular phone indicate that two one-minute calls were made to Theodosopoulos's residence at 11:46 a.m. and 12:13 p.m. A single call was placed at 12:30 p.m. from Theodosopoulos's phone to Ghanayem's cellular phone.

After this meeting, Ghanayem and Shunnarah drove from the parking lot to the Resurrection Hospital, where Ghanayem had a foreign object removed from his eye. Ghanayem and Shunnarah then drove to an alleyway, where they stopped at a garage behind Theodosopoulos's residence. Here, Special Agents Jeff Hall and William Krieg observed Ghanayem and Shunnarah speaking with a number of individuals, one of whom matched the physical description of Theodosopoulos. Ghanayem testified that he

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[2] Ghanayem testified to an entirely different version of the events. He testified that on May 23, Grant again proposed the cocaine deal, to which Ghanayem responded: "I don't do drugs, I don't want any drugs, don't bring no drugs by my business and I wasn't involved in any drugs."

took each of these actions only after repeated pressure from Grant.

At approximately 1:00 p.m., Shunnarah paged Grant, told him that the individual with the money was ready to complete the deal and that they would once again meet him at the Chicago Billiards's parking lot. When Grant arrived, he observed Shunnarah's car (containing both Ghanayem and Shunnarah) parked next to a gray Nissan 300 ZX. Grant parked next to Ghanayem and asked to see the money. At that moment, the gray Nissan drove in front of Grant's car. Grant recognized the car's passenger as Theodosopoulos. Theodosopoulos held up a stack of money and waved it so Grant could see it. Theodosopoulos then drove out of the parking lot and Shunnarah asked for the cocaine. Grant contacted undercover Agent Hall who, upon arrival, asked Shunnarah to have his people return with the money so they could count it. Shunnarah refused and told Grant that he would instead get his own money from Kentucky and purchase the cocaine himself.

Ghanayem and Theodosopoulos were subsequently arrested and charged in a two-count indictment for conspiracy to possess with intent to distribute cocaine and attempt to possess with intent to distribute cocaine. A jury trial began on October 13, 1993. At the close of the government's case, both defendants moved for directed findings of not guilty and judgments of acquittal. The district court denied both defendants' motions. Theodosopoulos then rested without testifying or presenting any evidence. Ghanayem presented a defense, including testifying on his own behalf.

After Ghanayem rested, he sought to enter into evidence a plea agreement between Shunnarah and the United States. Mazen Shunnarah had been indicted in Lexington, Kentucky and charged with conspiring to possess cocaine with intent to distribute. Pursuant to a written plea agreement with the United States Attorney's Office in Lexington, he had entered a guilty plea. Under the terms of this

agreement, which did not expressly bind the United States Attorney's Office in the Northern District of Illinois, Shunnarah was obligated to cooperate with the United States. The government did not call Shunnarah as a witness in the trial. When Ghanayem called Shunnarah to the stand, however, Shunnarah exercised his Fifth Amendment right not to testify. The government informed the court that Shunnarah had made statements that were favorable to the defense—specifically, that Ghanayem had never been involved in a drug deal before. As a result, the court ordered a missing witness instruction. The court advised the jury: (1) that Shunnarah had entered a guilty plea in Lexington, Kentucky; (2) that he was obligated under the terms of that plea agreement to cooperate with the government and tell the truth; and (3) that Shunnarah was in the exclusive control of the government and that the failure to call Shunnarah to the witness stand permitted the jury to infer that his testimony would have been unfavorable to the government. In his closing argument, Ghanayem argued this inference to the jury and suggested that Shunnarah, the sole wrongdoer, would have exculpated Ghanayem. The defendants renewed their motions for judgments of acquittal at the close of all the evidence. The district court expressly reserved ruling on the motions, under Fed. R. Crim. P. 29, until after the jury reached verdicts.

On October 20, 1993, the jury found Ghanayem and Theodosopoulos not guilty of the attempt count and guilty of the conspiracy charge. The district court initially denied Ghanayem's oral motion for a new trial and for acquittal; after consideration of written motions, however, the district court granted Ghanayem's post-trial motion for acquittal under Fed. R. Crim. P. 29, *United States v. Ghanayem*, 845 F.Supp. 556 (N.D.Ill. 1994), on the ground that the government had entrapped Ghanayem. The government then filed a motion, pursuant to Fed. R. Crim. P. 29(d), seeking a conditional ruling on the pending motion for a new trial. Pursuant to the government's request, the district court denied Ghanayem's new trial motion,

founded on the grounds of new evidence. The district court then also granted Theodosopoulos's motion for judgment of acquittal for lack of evidence, and set aside both jury verdicts.

The government now appeals both judgments of acquittal. Ghanayem challenges the district court's denial of his motion for a new trial.

II. Khadir Ghanayem

A.

With regard to Ghanayem's directed judgment of acquittal, the government raises only one issue on appeal: the sufficiency of the evidence to support the jury's conclusion that Ghanayem was a knowing member of the charged conspiracy and was not entrapped as a matter of law. The standard for appellate review of a trial court's post-verdict judgment of acquittal is the same as that applied by the trial court. *United States v. Beck*, 615 F.2d 441 (7th Cir. 1980); *see United States v. Brennan*, 994 F.2d 918, 922 (1st Cir. 1993). The test is whether the record contained sufficient evidence from which the jury could reasonably find the defendant guilty beyond a reasonable doubt. We view the evidence in the light most favorable to the government, recognizing that it is the exclusive function of the jury to determine the credibility of witnesses and draw reasonable inferences. *United States v. Douglas*, 874 F.2d 1145, 1155 (7th Cir.), *cert. denied*, 493 U.S. 841 (1989). The defendant "bears a heavy burden on appeal, as he must demonstrate that no rational trier of fact could decide beyond a reasonable doubt that he was not entrapped." *United States v. Cervante*, 958 F.2d 175, 178 (7th Cir. 1992). "Only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt, may an appellate court overturn the verdict." *United States v. Whaley*, 830 F.2d 1469, 1473 (7th Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988); *United States v. Atterson*, 926 F.2d 649, 655 (7th Cir.), *cert. denied*, 501 U.S. 1259 (1991).

In entrapment cases, the government must prove beyond a reasonable doubt that a defendant who raises a colorable defense of entrapment, as Ghanayem did, has not in fact been entrapped. *United States v. Hollingsworth*, 27 F.3d 1196, 1203 (7th Cir. 1994) (*en banc*) (citing *Jacobson v. United States*, 112 S.Ct. 1535, 1540 (1992)). The defense of entrapment consists of two elements: (1) government inducement of the crime; and (2) a lack of predisposition on the part of the defendant to engage in criminal conduct. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *United States v. Gootee*, 34 F.3d 475, 477 (7th Cir. 1994); *United States v. Johnson*, 32 F.3d 304, 307 (7th Cir. 1994). The lack of predisposition is the principal element in the entrapment defense. *Johnson*, 32 F.3d at 307 (citing *United States v. Russell*, 411 U.S. 423, 433 (1973); *United States v. Evans*, 924 F.2d 714, 717 (7th Cir. 1991)). Moreover, once the defendant presents sufficient evidence tending to show that the government induced him to break the law, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was disposed to commit the crime prior to being approached by government agents. *Jacobson*, 112 S.Ct. at 1540; *United States v. Ellis*, 23 F.3d 1268, 1272 (7th Cir. 1994); *United States v. Groll*, 992 F.2d 755, 759 (7th Cir. 1993).[3]

"Predisposition focuses on whether the defendant was an unwary innocent or, instead, an unwary criminal who readily avails himself of the opportunity to perpetrate the crime." *Johnson*, 32 F.3d at 307 (quoting *Mathews*, 485 U.S. at 63) (internal quotations omitted). This Court looks to five factors to determine whether the defendant had the predisposition to commit the charged offense: (1) the character or reputation of the defendant; (2) whether the suggestion of criminal activity was originally made by the government; (3) whether the defendant was engaged in

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[3] We also note that where there is sufficient evidence that a defendant is predisposed to commit the crime, we do not need to inquire into government inducement. *Johnson*, 32 F.3d at 308.

criminal activity for a profit; (4) whether the defendant evidenced a reluctance to commit the offense, overcome by government persuasion; and (5) the nature of the inducement or persuasion offered by the government." *Johnson*, 32 F.3d at 307, n.5 (citing *United States v. Haddad*, 976 F.2d 1088, 1095 (7th Cir. 1992)); *Hollingsworth*, 27 F.2d at 1205 n.1 (Coffey, J., dissenting); *United States v. Gonzalez*, 19 F.3d 1169, 1172 (7th Cir. 1994); *United States v. Santiago-Godinez*, 12 F.3d 722, 728 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1630 (1994). The most important factor is whether the defendant exhibited a reluctance to commit the offense that government agents overcame. *Johnson*, 32 F.3d at 307 n.5 (citing *Santiago-Godinez*, 12 F.3d at 728).

"Generally . . . the question of entrapment is one for the jury, rather than for the court." *Johnson*, 32 F.3d at 307. Although Fed. R. Crim. P. 29 permits a court to direct a verdict of acquittal where there is "no evidence" from which a jury could find guilt beyond a reasonable doubt, *see Whaley*, 830 F.2d at 1473, in cases where there is at least some evidence in the record, it is for the jury to decide questions of fact, to weigh conflicting testimony, to draw reasonable inferences from the evidence and to make credibility determinations. The jury must examine the evidence as a whole (including trial testimony and tape recordings), assess its weight and reliability, and resolve contradictions in favor of either side. This is especially true in the entrapment context, for whether "entrapment occurred is a factual issue; 'the defense . . . is intertwined with the issue of intent and is often based on credibility determinations, which are traditionally reserved for jury resolution.' " *Johnson*, 32 F.3d at 307 (quoting *Santiago-Godinez*, 12 F.3d at 727).

The district court, however, concluded that the evidence introduced at trial established beyond a reasonable doubt, as a matter of law, that the government had entrapped Ghanayem. In granting Ghanayem's Rule 29 motion, the district court stated:

> Taking [Grant's] testimony in a vacuum, the jury was presented with sufficient evidence upon which to find

> that Ghanayem was predisposed to arrange a cocaine deal. However, the testimony of agent Grant and Ghanayem must be considered together with the unimpeached taped recorded conversations introduced by the government. These tapes, which the government introduced as authentic representations of later recorded conversations, effectively undercut the weight and reliability of agent Grant's testimony about Ghanayem's behavior at the earlier meetings. In light of the tapes, the government's evidence was insufficient to support a finding of predisposition.

845 F. Supp. at 561. In reaching this conclusion, the district court examined the government's predisposition evidence. It first determined that the government had presented no evidence that Ghanayem had ever been involved in, arrested for, or convicted of any drug offense, or that Ghanayem had anything to do with illegal drug trafficking. Second, the court found that the government had initiated negotiations with Ghanayem. The court then examined the government's other evidence, including the taped conversations between Ghanayem and Grant, and concluded that the government had not presented sufficient circumstantial evidence to support a finding of Ghanayem's predisposition. *Id.* at 562-63. We disagree.

The district court relied heavily on what it considered conflicting testimony regarding Ghanayem's responses to Grant's contact with him. The court determined that the taped conversations introduced by the government not only showed Ghanayem as unwilling to participate[4] but

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[4] Agent Grant testified that during the meeting on May 7, Ghanayem accepted Grant's offer to arrange a drug transaction. The district court points to several moments in the taped conversation which, the court opines, indicate Ghanayem's reluctance to engage in the transaction. First, in response to Grant's inquiry about Ghanayem's contact with Shunnarah, Ghanayem stated: "He never called me, I was wanting a . . . wasn't able to get a hold of me, he couldn't get a hold of it." Later, when asked if he knew anyone

(Footnote continued on following page)

also showed Grant's testimony to be of "questionable reliability and accuracy."[5]

Examining all the evidence in the record in the light most favorable to the government, we conclude that the government presented sufficient evidence to permit a jury to determine beyond a reasonable doubt that Ghanayem had the requisite predisposition. By reason of Ghanayem's previous experiences and acquaintances, it is "likely that if the government had not induced him to commit the crime, some criminal would have done so." *Hollingsworth*, 27 F.3d at 1200. We reach this conclusion on the basis of the five factor test this Court follows.

First, the government proffered evidence that Ghanayem's character and reputation predisposed him to being involved in a drug transaction. The district court concluded that "[t]he government presented no evidence that Ghanayem had ever been involved in, arrested for, or convicted of any drug offense." 845 F.Supp. at 559. A review of the trial record, however, leads us to a different conclusion. Although Ghanayem had no previous cocaine-related offenses, Agent Grant testified that Ghanayem had a previous marijuana conviction.[6] Furthermore, Ghanayem used

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[4] *continued*

else who might be interested in purchasing drugs, Ghanayem replied: "Not off hand only one person. You . . . this is the one person that I know that, you know, he's a he's a close friend of mine. . . ." The district court indicates that Ghanayem's stammering responses reflect a confused and ambivalent person reluctant to be involved in the cocaine deal, rather than the reactions of an experienced drug dealer.

[5] The district court, in a footnote, contends that it is not weighing the testimony, which it admits is a jury function, but rather is concluding that the government did not present sufficient evidence to establish predisposition.

[6] The district court noted that Grant had given "unsubstantiated" testimony that Ghanayem had a prior marijuana possession arrest. 845 F.Supp. at 559 n.2. Agent Grant actually testified that, although he was uncertain as the specifics, Ghanayem had a previous marijuana *conviction*.

terminology that indicated he was experienced in the drug trade. *See Johnson*, 32 F.3d at 308; *Cervante*, 958 F.2d at 179 (ease in communicating in drug dealing jargon is relevant in examining character and reputation); *United States v. Rivera-Espinoza*, 905 F.2d 156, 158 (7th Cir. 1990) (defendant's use of drug business terms of art evidenced his knowledge of the drug trade). Ghanayem also showed his awareness of the usual course of dealings in drug transactions. On May 20, 1993, Ghanayem informed Grant that although he did not want to participate directly in the negotiations between Grant and Shunnarah, he wanted Grant to add $1,000 to the price of each kilogram of cocaine sold (which Grant would pass along to Ghanayem as a finder's fee). This insistence on $1,000 per kilogram sold to Shunnarah indicates that Ghanayem was aware of the range for a broker's fee for bringing together a supplier and distributor of cocaine. *See Santiago-Godinez*, 12 F.3d at 729-30 ($2,000 per kilogram fee is not extraordinary). He thus indicated his "sophistication and knowledge of the drug business," *United States v. Perez-Leon*, 757 F.2d 866, 872 (7th Cir.), *cert. denied*, 474 U.S. 831 (1985); *United States v. Beverly*, 913 F.2d 337, 355 (7th Cir. 1990), *cert. denied*, 498 U.S. 1052 (1991), and "demonstrated that [he] was 'not unfamiliar with the business for which' [he] was convicted by using terms of art." *Beverly*, 913 F.2d at 355 (internal punctuation omitted).

The second factor is not in dispute. The government concedes that on April 22, 1993, it approached Ghanayem, made the initial contact and suggested the drug deal. While this factor does support Ghanayem's case, "mere solicitation by a government agent is insufficient to establish entrapment." *Johnson*, 32 F.3d at 308; *Cervante*, 958 F.2d at 179; *United States v. Blackman*, 950 F.2d 420, 424 (7th Cir. 1991); *Perez-Leon*, 757 F.2d at 872.

The third factor favors the government in that the record reflects that Ghanayem engaged in criminal activity for a profit. In fact, it appears that the singular purpose of Ghanayem's involvement in the drug transaction was to profit. Grant testified that from the outset, Ghanayem

maintained a "what's-in-it-for-me" attitude and insisted on his piece of the action. As discussed above, Ghanayem wanted $1,000 per kilogram of cocaine as a profit on sales to Shunnarah. Record testimony also indicates that Ghanayem repeatedly stressed the importance of the $1,000 and wanted to prevent any direct contact between him (Ghanayem) and Shunnarah in order to insure he received this broker's fee. Viewing the evidence in the light most favorable to the government, we recognize that a jury could reasonably have concluded that "a person who operates in a chain of cocaine distribution does not do so at a financial loss," *Beverly*, 913 F.2d at 356; *Perez-Leon*, 757 F.2d at 872, and that Ghanayem sought to profit from the drug transaction.

The fourth, and most important factor, also favors the government. It was reasonable for the jury to conclude that the defendant did not express reluctance which government persuasion overcame. While Ghanayem maintains that he informed Grant that he did not buy, sell or deal in drugs, Grant testified that Ghanayem did not express any reluctance at becoming involved and serving as a middleman. Furthermore, the record is void of any evidence that Ghanayem was cajoled into the conspiracy. Rather, Grant approached Ghanayem with the opportunity not only to provide Shunnarah with a source of cocaine, but also to make a considerable profit (for minimal effort). Grant's testimony concerning his contacts with Ghanayem demonstrates that Ghanayem was willing and eager to participate in a drug transaction and, with the exception of Ghanayem's own testimony, the record is devoid of any evidence suggesting that Ghanayem was reluctant to participate.

Ghanayem remained an enthusiastic and active participant in the conspiracy. Throughout the course of the dealings, Ghanayem did not abandon the transaction when it encountered trouble spots; to the contrary, Ghanayem expressed his willingness to pursue the transaction. On May 7, 1993, Ghanayem informed Grant that he could not reach his contact, but that he would continue to try to reach

him that evening. On May 12, when Grant inquired as to when Ghanayem's contact would be ready, Ghanayem told Grant that he would find out right away. On May 17, Ghanayem told Grant that although he had been unable to reach his contact, he would continue his communication efforts. Again, on May 19, Ghanayem noted his difficulty in reaching his contact but reassured Grant that he would try to call him later.

Once the transaction was off and running, Ghanayem expressed in his numerous meetings with Grant neither reluctance at being involved nor the desire to get out. On May 20, Ghanayem drove around with Grant and Shunnarah, working out the details of the transaction. He was directly involved in setting up the time and place for the deal to be fully completed. On May 21, even after Grant had direct contact with Shunnarah, Ghanayem was instrumental in attempting to complete the deal. On May 23, Ghanayem again was the pivotal figure in setting up each aspect of the deal. He remained in constant contact with Grant and, with Shunnarah, communicated with Theodosopoulos. Ghanayem was present in the Chicago Billiard's parking lot when the cocaine for money transaction was to occur and when Theodosopoulos flashed the money at Grant.

Fifth, the nature of the government's inducement and persuasion do not support Ghanayem's entrapment theory. The government did not threaten, intimidate or coerce Ghanayem. They did not spend over two years pressuring him into this transaction, as in *Jacobson*, nor a year, as in *Hollingsworth*. Rather, the government's interaction with Ghanayem merely stretched over the course of three months and nine meetings. The government did not offer any special inducements or promises to Ghanayem. Although Ghanayem contends that the legitimate car repair transaction created pressure on him to continue a relationship with Grant, when viewed in light of his $1,000 per kilogram profit, it was reasonable for the jury to conclude that this was not actually a coercive factor. Ghanayem stood to make at least $5,000 ($1,000 for each of 5

kilograms) for the cocaine—a far greater profit than he would net from the car repairs. Finally, even if we were to credit Ghanayem's testimony, the $450 was not overly large, and "[w]hen a person accepts a criminal offer without being offered extraordinary inducements, he demonstrates a predisposition to commit the type of crime involved." *Evans*, 924 F.2d at 718; *see Cervante*, 958 F.2d at 180.

Thus, it was reasonable for the jury to have concluded that Ghanayem was in a "position without the government's help to become involved in illegal activity." *Hollingsworth*, 27 F.3d at 1200. Although Ghanayem may not have otherwise become involved in the drug conspiracy at that particular moment in time, the government sufficiently proved that he was predisposed to commit the crime at some point. In this case, the government's involvement may have affected the timing of the offense; it did not force the offense. Based on our review of the record, and in light of the five factors discussed above, we conclude that there was more than enough evidence to support the jury's conclusion that Ghanayem was predisposed to conspire to possess with the intent to distribute cocaine and, as such, was not entrapped. "We will not disturb the jury's credibility determinations unless it credits exceedingly improbable testimony," *Cervante*, 958 F.2d at 108 (citing *United States v. Jones*, 950 F.2d 1309, 1315 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1700 (1992); *United States v. Cardona-Rivera*, 904 F.2d 1149, 1152-53 (7th Cir. 1990)), and such is not the case here.

B.

Ghanayem also argues that the district court erred in denying his motion for a new trial. He contends that he was entitled to a new trial based upon newly discovered evidence which demonstrates that he was not predisposed to commit the crime. Specifically, Ghanayem maintains that after the trial, Mazen Shunnarah would have provided testimony, previously unavailable, which would have exculpated Ghanayem.

The government brought Shunnarah to the Northern District of Illinois under subpoena. In Shunnarah's initial interview with the government, he admitted that he had attempted to purchase the five kilograms of cocaine from Grant, that Ghanayem had arranged the contact, that Ghanayem was to receive a percentage of the profits, and that Theodosopoulos was providing a portion of the purchase money. Closer to the trial date, Shunnarah changed his story and withdrew his statements regarding Theodosopoulos's involvement. Because of these differing stories, the government did not call Shunnarah as a witness. Ghanayem did call Shunnarah as part of his defense. Although Shunnarah had already pled guilty in Lexington, he had not yet been sentenced. Shunnarah thus refused to testify, exercising his Fifth Amendment right against self incrimination.

We will reverse a district court's denial of a motion for a new trial based on newly discovered evidence only if the district court has abused its discretion. *Gootee*, 34 F.3d at 479; *United States v. DePriest*, 6 F.3d 1201, 1216 (7th Cir. 1993). "We approach such motions with great caution and are wary of second-guessing the determinations of both judge and jury." *DePriest*, 6 F.3d at 1216; *United States v. Kamel*, 965 F.2d 484, 490 (7th Cir. 1992).

Rule 33 of the Federal Rules of Criminal Procedure provides that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interests of justice." To justify a new trial based on newly discovered evidence, Ghanayem must satisfy a stringent multistage test. *United States v. Young*, 20 F.3d 758, 763 (7th Cir. 1994). He must show that the evidence: (1) came to his knowledge only after trial; (2) could not have been discovered sooner through the exercise of due diligence; (3) is material, and not merely impeaching or cumulative; and (4) would probably lead to an acquittal in the event of a new trial. *Gootee*, 34 F.3d at 479; *DePriest*, 6 F.3d at 1216-17.

Ghanayem fails to satisfy either of the first two prongs.[7] First, Ghanayem has not established that the evidence came to his knowledge only after trial. To the contrary, Ghanayem and his counsel knew during trial the substance of Shunnarah's testimony. Prior to the commencement of trial, defense counsel interviewed Shunnarah. At trial, counsel for Ghanayem explicitly stated that "when [Shunnarah] took the stand he would have said that Shunnarah [sic Ghanayem] had nothing to do with the deal, that Chris [Theodosopoulos] had nothing to do with the deal, that he was doing the deal with Grant himself. . . . I interviewed Mr. Shunnarah. . . . he told us those things." *See United States v. Ellison*, 557 F.2d 128, 133 (7th Cir.) ("the facts alleged in support of a motion for a new trial were within the defendant's knowledge at the time of trial" and therefore not newly discovered), *cert. denied*, 113 S.Ct. 332 (1992). Other courts have also held that this kind of post-trial testimony does not qualify as newly discovered evidence. *See United States v. Dale*, 991 F.2d 819, 838 (D.C. Cir. 1992), *cert. denied*, 114 S.Ct. 650 (1993); *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.), *cert. denied*, 113 S.Ct. 258 (1992); *United States v. Munoz*, 957 F.2d 171, 173 (5th Cir.), *cert. denied*, 113 S.Ct. 332 (1992); *Blissett v. LeFevre*, 924 F.2d 434, 441 & n.1 (2d Cir.), *cert. denied*, 502 U.S. 852 (1991); *United States v. Lockett*, 919 F.2d 585, 591 (9th Cir. 1990).

Ghanayem also fails to meet the second prong of the test. In order to satisfy this element, Ghanayem would have to show that he could not have discovered the relevant evidence despite the exercise of due diligence. *Kamel*, 965 F.2d at 492-93. Even if we assume (however unlikely it may be) that Ghanayem had no knowledge of Shunnarah's potential testimony, Ghanayem cannot demonstrate that

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[7] Although Ghanayem's failure to satisfy *any* of the prongs precludes his obtaining a new trial, we nonetheless discuss his failure to satisfy the first two. We do not address whether Shunnarah's testimony was material and exculpatory nor whether it would probably lead to an acquittal in the event of a retrial.

he exercised the requisite "due diligence." He took no steps to secure Shunnarah's testimony. Rather, Ghanayem chose another strategy: give a missing witness instruction and then argue forcefully to the jury the substance of Shunnarah's missing testimony. That Ghanayem's trial tactics failed is not grounds for a new trial. As a result, the district court did not abuse its discretion in denying Ghanayem's motion for a new trial.[8]

III. Christ Theodosopoulos

In appealing the district court's directed judgment of acquittal of Theodosopoulos, the government contends that the evidence introduced at trial was sufficient to support a rational jury's conclusion that beyond a reasonable doubt Theodosopoulos conspired to possess cocaine with the intent to distribute it. In granting Theodosopoulos's motion for a judgment of acquittal, the district court concluded:

> I find the evidence is insufficient to establish beyond a reasonable doubt that Mr. Theodosopoulos was part of the drug conspiracy that is alleged at the indictment. . . . [A]t the close of the government's case . . . I expressed specific concerns about the lack of evidence as to Mr. Theodosopoulos and the difficulty I had even with respect to drawing all reasonable inferences in the government's favor after the government rested.
>
> I was concerned about the sparsity of the evidence and the equivocal nature of the evidence. . . . I am convinced that a rational jury could not convict Christ Theodosopoulos of Count I of the indictment beyond a reasonable doubt.

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[8] The government contends that Ghanayem waived any argument based on newly discovered evidence. Everything that the government identifies as waiver is more appropriately addressed under the "due diligence" prong of the test. *See Kamel*, 965 F.2d at 493.

The government first argues that the evidence established the existence of a cocaine conspiracy. Second, the government maintains that Theodosopoulos was a knowing member of that conspiracy who participated in and intended to advance the ends of that conspiracy.

In examining a sufficiency of the evidence claim, we review the record in the light most favorable to the government, and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (emphasis in original); *United States v. Billops*, Nos. 94-2035, 94-2303, slip op. at 2 (7th Cir. Dec. 16, 1994); *United States v. Howell*, 37 F.3d 1197, 1201 (7th Cir. 1994); *United States v. Byerley*, 999 F.2d 231, 234 (7th Cir. 1993). When reviewing the conviction, we may accept any adequate evidence, including circumstantial evidence, as support for a conviction. *United States v. Baskin-Bey*, Nos. 93-3452, 93-3648, slip op. at 4 (7th Cir. Jan. 17, 1995); *United States v. Durrive*, 902 F.2d 1221, 1229 (7th Cir. 1990). A jury conviction should be taken away "only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Rosalez-Cortez*, 19 F.3d 1210, 1215 (7th Cir. 1994).

To prove Theodosopoulos guilty of a drug conspiracy, the government must prove beyond a reasonable doubt: (1) a conspiracy existed; (2) Theodosopoulos knew of the conspiratorial agreement; and (3) Theodosopoulos intended to join it. *United States v. James*, 40 F.3d 850, 864 (7th Cir. 1994), *cert. denied*, ____ U.S. ____ (Jan. 23, 1995); *United States v. Crowder*, 36 F.3d 691, 695 (7th Cir. 1994) ("To sustain a conspiracy charge, the government need only prove the existence of the conspiracy and a participatory link with the defendant.") (quoting *United States v. Blas*, 947 F.2d 1320, 1325 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1234 (1992)), *cert. denied*, ____ U.S. ____ (Feb. 21, 1995); *United States v. Campbell*, 985 F.2d 341, 344-45 (7th Cir. 1993).

Without question, there is adequate evidence in the record that a cocaine conspiracy existed. Indeed, the district court did not conclude otherwise; rather the court entered a judgment of acquittal for Theodosopoulos because of the lack of evidence that he was part of that conspiracy. Neither party has appealed the finding of a conspiracy and we thus accept it.

The record contained sufficient evidence for the jury to find that Theodosopoulos was a knowing member of the conspiracy.[9] To prove that a particular defendant was a member of an ongoing conspiracy, the government must present "substantial evidence that [the] defendant knew of the illegal objective of the conspiracy and agreed to participate in its achievement." *James*, 40 F.3d at 865 (quoting *United States v. Burrell*, 963 F.2d 976, 987 (7th Cir.), *cert. denied*, 113 S.Ct. 357 (1992)). Although the jury may not rest its verdict solely by piling inference upon inference, *United States v. Martinez*, 937 F.2d 299, 304 (7th Cir. 1991), the government may prove Theodosopoulos's participatory link to the conspiracy solely by way of circumstantial evidence. *United States v. Townsend*, 924 F.2d 1385, 1390 (7th Cir. 1991). Thus, while mere presence is not enough by itself to convict a defendant, *see United States v. Cochran*, 955 F.2d 1116, 1123 (7th Cir.), *cert. denied*, 133 S.Ct. 460 (1992), this presence, along with other evidence indicating that the presence or act was intended to advance the ends of the conspiracy, suffices. *See United States v. Carson*, 9 F.3d 576, 587 (7th Cir. 1993), *cert. denied*, 115 S.Ct. 135 (1994); *Cochran*, 955 F.2d at 1123 ("[p]resence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the conspiracy"); *United States v. Simone*, 931 F.2d 1186, 1193 (7th Cir.), *cert. denied*, 502 U.S. 981 (1991).

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[9] We reach this conclusion without relying on the co-conspirator statements of Ghanayem and Shunnarah and therefore do not address the government's contention that the district court erred in excluding such evidence under Federal Rule of Evidence 801(d)(2)(E).

Theodosopoulos's presence at the automobile body shop garage on May 20, 1993, at the time set for the first planned exchange of money and cocaine, supports the government's contention that the defendant was a knowing member and active participant in the conspiracy. Grant testified that the meeting at the garage on May 20 took place so that the individual with the money could observe the cocaine and then pay the undercover agent $21,000 for one kilogram of cocaine. It was reasonable for the jury to infer that Theodosopoulos—and not Shunnarah—was the "money man" in that although Shunnarah examined the cocaine in the Plush Pup parking lot, he did not complete the transaction at that time and rather, insisted that the transaction be completed at the automobile shop. *See United States v. Hernandez*, 948 F.2d 316, 321 (7th Cir. 1991).

The government also points to Theodosopoulos's presence on two separate occasions on May 23, 1993, that demonstrate his participation in the conspiracy. The government proffered evidence that Theodosopoulos met and spoke with Ghanayem and Shunnarah in the alley behind Theodosopoulos's residence just moments after the two left to meet with their "money man" and just prior to Shunnarah's planned meeting with the undercover agent to give him the money. Grant and Shunnarah had decided to complete the drug deal on this day. It was reasonable for the jury to infer from the circumstances that since neither Ghanayem nor Shunnarah had money themselves, they were attempting to obtain purchase money elsewhere, such as from Theodosopoulos.

The government also argues that Theodosopoulos's presence in the parking lot on May 23, 1993, and his subsequent waving of money at Grant, further establish his participation in the conspiracy. Although "mere knowledge of, approval of, association with, or presence at a conspiracy is insufficient to establish . . . participation," *Durrive*, 902 F.2d at 1225, a "defendant's presence at the scene where coconspirators acted in furtherance of the conspiracy's ultimate objective is a probative factor which may be considered with other factors in assessing the suf-

ficiency of the evidence." *James*, 40 F.3d at 865 (citing *Burrell*, 963 F.2d at 988). Had Theodosopoulos simply been driving by the drug transaction—coincidentally in the wrong place at the wrong time—this would not be enough to establish his link to the conspiracy. However, at the exact moment in the transaction when the "money-man" would show the money to the supplier, Theodosopoulos stopped his car in front of Grant, Ghanayem and Shunnarah, and purposefully waived a handful of currency at them. It was entirely reasonable for the jury to conclude that the display of money was intended to advance the ends of the conspiracy by showing the suppliers that the money was present and the narcotics deal was about to be completed. The mere fortuitous presence at the scene where a crime takes place does not prove participation in the conspiracy, but the presence of the defendant at critical junctures, such as these, alone can establish a defendant's participation. *See United States v. Pazos*, 993 F.2d 136 (7th Cir. 1993); *Burrell*, 963 F.2d at 990-91; *Cochran*, 955 F.2d at 1122.

Theodosopoulos argues that Grant's testimony that Theodosopoulos, while in the gray car, drove by Grant, Shunnarah and Ghanayem in the parking lot and flashed the money indicates that, if anything, Theodosopoulos did not intend to be part of any drug transaction. He argues that if he had intended to be a participant, he would have remained rather than left. The existence of an alternative explanation for Theodosopoulos's actions does not sink the government's case. "The fact that the government's evidence might also be consistent with an alternate theory is irrelevant; the law does not require the government to *disprove* every conceivable hypothesis of innocence to sustain a conviction on an indictment proved beyond a reasonable doubt." *Townsend*, 924 F.2d at 1389 (citations omitted) (emphasis in original).

The government also introduced telephone records that established circumstantially that Shunnarah and Theodosopoulos had several conversations around the time of the planned money-for-cocaine exchange. Viewing this evidence

in the light most favorable to the government, it was reasonable for a jury to conclude that the timing and circumstances surrounding the placing of these calls established that Shunnarah and Theodosopoulos were in contact at this time. On May 23, 1993, two one-minute calls—at 11:46 a.m. and 12:13 p.m.—were made from Ghanayem's cellular telephone (which was with Shunnarah at the time) to Theodosopoulos's residence. At 12:30 p.m., a single call was made from Theodosopoulos's home to Ghanayem's cellular phone. While the telephone calls by themselves are not dispositive, their timing is quite probative. All three calls took place immediately after Shunnarah spoke with Grant and informed him that they were still waiting for their money source (11:35 a.m.) and before Shunnarah contacted Grant to tell him that they were now ready to complete the drug transaction. (1:10 p.m.). Furthermore, it was immediately after the 12:13 p.m. call that Shunnarah and Theodosopoulos met in person behind the garage at Theodosopoulos's residence. It was reasonable for the jury to infer from the telephone calls that the two defendants had contacted each other and had done so for the purposes of furthering the criminal conspiracy. *See United States v. Hirschberg*, 988 F.2d 1509, 1516 (7th Cir.), *cert. denied*, 114 S.Ct. 311 (1993); *Burrell*, 963 F.2d at 991; *Hernandez*, 948 F.2d at 321.

Theodosopoulos argues that the absence of records of telephone calls—for example, between the Theodosopoulos residence and Lexington—undermines the relevance of the existence of the phone records on the date and around the time of the proposed money-for-cocaine exchange. The jury, however, had the opportunity to consider this evidence at trial and weigh its importance, and was reasonable in ultimately concluding that Theodosopoulos participated in the conspiracy.

We recognize that the government's case was built in large part on circumstantial evidence, as is often true in conspiracy cases. It is also possible that we may have reached a different result if we had sat as jurors. However, "the mere existence of other possible hypotheses

is not enough to remove the case from the jury." *United States v. Duarte*, 1 F.3d 644, 650 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 724 (1994). As we have cautioned before, Rule 29 is not a device to replace jury findings with the conclusions of district court judges. *Id.* We will only take a conviction away from a jury on sufficiency grounds when the government has offered no evidence from which a jury could conclude beyond a reasonable doubt that crime had been committed. *Atterson*, 926 F.2d at 655 ("We must affirm unless the record is barren of any evidence, regardless of its weight, from which the trier of fact could find guilt beyond a reasonable doubt."). Here, there was enough evidence, albeit circumstantial, for a reasonable jury to conclude beyond a reasonable doubt that a conspiracy did exist and Theodosopoulos was a knowing and active participant in it.

For the foregoing reasons, we REVERSE the district court's judgments of acquittal, AFFIRM the denial of Ghanayem's new trial motion, reinstate the jury verdicts, and REMAND for sentencing.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 18, 1995

HON. JOEL M. FLAUM, Circuit Judge

HON. FRANK H. EASTERBROOK, Circuit Judge

HON. JAMES C. PAINE, District Judge[1]*

UNITED STATES OF AMERICA, Plaintiff-Appellant, Nos. 93-3831 and 94-1384 v. CHRIST THEODOSOPOULOS and KHADIR GHANAYEM, Defendant-Appellees.	)	Appeal from the United Court for the Northern District of Illinois Eastern Division 93 CR 510 Judge Conlon
UNITED STATES OF AMERICA, Plaintiff-Appellee, Nos. 94-2417	)	Appeal from the United Court for the Northern District of

[1] The Honorable James C. Paine, of the United States District Court for the Southern District of Florida, sitting by designation.

	)	Illinois
v.	)	Eastern
	)	Division
KHADIR GHANAYEM,	)	
	)	
Defendant-Appellant.	)	93 CR 510
	)	
	)	Judge Conlon

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. According,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Federal Rules of Criminal Procedure Rule 29 -- (c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.